

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC MAURICE HAMMOND,

Defendant-Appellant.

UNPUBLISHED

September 18, 2008

No. 278220

Wayne Circuit Court

LC No. 06-010856-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to six months to five years' imprisonment for the felon in possession of a firearm conviction, and five years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

This case arises from an arrest that occurred on September 6, 2006, in Detroit, Michigan. Around 2:40 a.m., on that date, Detroit police sergeant Kurt Worboys was patrolling the area of Brentwood and Charleston in an undercover vehicle. He observed two vehicles parked in the middle of Brentwood with two individuals standing in the street talking to someone in one of the vehicles. Sergeant Worboys testified that the first individual was a black male dressed in darkly colored clothing, and he was leaning into the window of a vehicle. The second individual was also a black male and was dressed in dark clothing, but he was several inches shorter than the first and had a lighter complexion. Worboys observed that the second individual was standing behind the first individual and holding a "blue steel" semi-automatic handgun down to his left side. Worboys immediately radioed for additional officers and Officer Mitchell and Officer Owen responded that they were on their way.

The two vehicles in the street started to drive away. Worboys began to follow them, but was only a block away when he heard on his radio that the other officers were arriving on the scene, and he headed back to assist them. As he approached the original location, he observed the officers exit their vehicles and begin chasing two individuals. Worboys saw at least one individual run up onto the porch at 412 Brentwood. Approximately five minutes later, Sergeant Worboys gained entry to the residence. At trial, he identified defendant as the individual he saw when he entered the house. He testified that defendant had attempted to barricade the door with

a couch and people in the house were shouting. The other officers secured the individuals on the ground floor, while Sergeant Worboys went upstairs to conduct a protective sweep of the house.

Sergeant Worboys testified that when he entered an upstairs bedroom he saw a black male dressed in dark clothing trying to get underneath a bed. He further testified that the individual he saw in the bedroom was not present in the courtroom on the day of trial. Sergeant Worboys placed that individual under arrest. He then looked into the bedroom closet and saw a loaded rifle in plain view.

Officer John Mitchell testified that when he first approached the scene in his fully marked police vehicle, he saw an individual squatting on the sidewalk in front of 412 Brentwood. At trial, he identified that individual as defendant. While in pursuit of defendant, Officer Mitchell observed defendant reach into his front waistband and pull out a blue steel semiautomatic handgun. Defendant dropped the gun to the ground near the porch steps.

Defendant disappeared into the house, and Officer Mitchell ran to the backyard to make sure defendant would not flee from a back door. After other officers forced entry into the house, Officer Mitchell came back around to the front porch where he recovered a loaded .40 caliber Glock blue steel automatic handgun from where defendant had dropped it near the porch.

Sergeant John Falk questioned defendant at the station house. The parties stipulated that defendant was sufficiently advised of his rights and his statement was voluntarily given. Defendant indicated in his statement that he was not outside 412 Brentwood the previous night with a gun and denied that he had run onto the porch and dropped something to the ground, and stated instead, that he was using the bathroom when police started kicking in the front door. Finally, when asked whether he ever handled or touched a Glock firearm, defendant responded, "No. But I was – but I had a shotgun in the house."

First, defendant argues that evidence of a rifle should have been suppressed as the fruit of an unlawful search and seizure. It is undisputed that police did not have a warrant to arrest defendant or search the house he was arrested in. Generally, a search and seizure that occurs without a warrant is unreasonable, unless probable cause and circumstances establishing an exception to the warrant requirement exist. *People v Tierney*, 266 Mich App 687, 704; 703 NW2d 204 (2005). Probable cause exists when the totality of the circumstances would lead a reasonably prudent person to believe that a crime was or is being committed and that the evidence sought will be found in a particular place. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001).

The existence of "exigent circumstances" is a recognized exception to the warrant requirement. *People v Blasius*, 435 Mich 573, 582; 459 NW2d 906 (1990). If police have probable cause to believe a crime was recently committed and that the premises contains evidence or perpetrators of that crime, they may enter a residence without a warrant if immediate action is necessary. *In re Forfeiture of \$176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993). That immediate action must be necessary to prevent the destruction of evidence, protect the police or others, or prevent the perpetrator's escape. *Id.*

Based on the evidence presented in this case, it is reasonable to conclude that officers believed they were chasing someone who had clearly been carrying a concealed weapon.

Officers did not know how many other individuals were inside the home and whether there were drugs or weapons inside. The totality of the circumstances presented a situation where the officers could reasonably conclude that they were in “hot pursuit” of a fleeing felon, that there was a risk of evidence being destroyed, or that the officers or additional persons could be in danger. See *People v Cartwright*, 454 Mich 550, 558-559; 563 NW2d 208 (1997). We conclude that the officers were justified in deciding that there was a need for immediate action and, therefore, the warrantless entry was not unlawful.

Police may lawfully conduct a protective search of a home after an arrest is made within it if they “reasonably believe that the area in question harbors an individual who poses danger to them or others.” *Beuschlein, supra* at 757. The sergeant testified that after defendant had been arrested, another individual in the house mentioned that someone may be upstairs. The sergeant went upstairs alone and witnessed a man attempting to hide. It would be reasonable for him to quickly look into an open closet in order to ensure his safety.

This Court recognizes that the “plain view doctrine” allows an officer to seize items, without a warrant to do so, when those items are in plain view and the officer is lawfully present in the location where the item is seized. *People v Fletcher*, 260 Mich App 531, 546; 679 NW2d 127 (2004). The incriminating character of the item must be immediately apparent. *Id.* Here, the sergeant was lawfully conducting a protective sweep of the second floor after defendant had been arrested. There is no evidence showing that any of the officers conducted additional searches beyond this protective sweep. Therefore, the rifle that was observed in plain view was not unlawfully seized.

Next, defendant argues that the statement he made to police officers should have been suppressed as the fruit of an unlawful search and seizure as well. Defendant did not move to suppress his statement and, therefore, that claim has been forfeited and will be reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is only warranted under the plain error standard if the alleged error resulted in an innocent defendant being convicted or it seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.*

Because the officers were justified in arresting defendant inside the house, we cannot conclude that admission of the statement resulted in an innocent person being convicted. Furthermore, it is undisputed that defendant was sufficiently apprised of his rights and the statement at issue was made voluntarily. When considering the additional evidence against defendant and the voluntariness of his admission, defendant has not sustained his burden of establishing that the fairness, integrity, or the public reputation of the proceedings was affected either.

Additionally, defendant argues that he was denied the effective assistance of counsel because his counsel failed to move for the suppression of defendant’s statement. Defendant has not properly presented this argument on appeal, as it was not included in the questions presented in defendant’s brief. See *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000); MCR 7.212(C)(5). Nevertheless, absent an evidentiary hearing on the issue of counsel’s effectiveness, this Court’s review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Effective assistance of counsel is presumed and, therefore, defendant carries a high burden of successfully proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Generally, to overcome this presumption, a defendant must establish: (1) that counsel's performance fell below an objective standard of reasonableness pursuant to the prevailing norms of the profession; (2) that a reasonable probability exists that, but for counsel's deficiency, the outcome of the proceedings would have been different; and (3) that the resulting outcome was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court has held that counsel's failure to raise "futile" objections does not constitute ineffective assistance of counsel. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

The exclusionary rule restricts evidence of materials and observations gathered from an unlawful search or seizure, as well as any additional products of that search or seizure. *People v Stevens*, 460 Mich 626, 634; 597 NW2d 53 (1999). If the record shows that defendant was unlawfully detained or the house was unlawfully searched, then counsel may have been deficient in failing to move for exclusion of defendant's statement as the fruit of that unlawful act.

We have already concluded that the officers were justified in finding exigent circumstances to enter the house, conducting the protective sweep, and seizing the rifle. The facts presented, along with the additional evidence, make it difficult for defendant to establish that the outcome of his case would have been different had counsel moved to suppress the statement. Although the statement was significant evidence against defendant at trial, the judge had already denied defendant's motion to suppress the rifle, ruling that exigent circumstances and the plan view doctrine applied. Therefore, it is highly likely that a motion to suppress his voluntary statement would have been denied as well. The alleged deficiencies of counsel did not prejudice defendant's case, and defendant has not overcome the presumption that counsel's assistance was effective.

Finally, defendant argues that there was insufficient evidence to convict him of felon in possession of a firearm and felony-firearm because the prosecution did not establish that defendant was in "possession" of the rifle.

When reviewing a claim of insufficient evidence, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of a crime may be established by drawing reasonable inferences from circumstantial evidence. *People v Nimeth*, 236 Mich App 616, 622; 601 NW2d 393 (1999). It is for the trier of fact to determine what particular inferences can fairly be drawn from the evidence presented. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Furthermore, this Court should not interfere with the trier of fact's determination of the weight of the evidence or the credibility of the witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

To establish the crime of felon in possession of a firearm, the prosecutor must show the following elements: (1) defendant possessed a firearm; (2) defendant had been convicted of a prior felony; and (3) less than five years had elapsed since defendant had been discharged from

probation. *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004), aff'd 473 Mich 626 (2005); MCL 750.224f. The word "possession" includes both actual and constructive possession, and it can be established by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). In *Burgenmeyer*, our Supreme Court held that "... a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant. Physical possession is not necessary as long as the defendant has constructive possession." *Id.* at 438.

As the husband and father of the individuals living in the house, defendant would visit periodically to "check on his wife and son." Defendant testified that he was trying to reconcile with his wife, and on the night in question, he was at her house at 2:00 a.m. Although defendant claims he did not live at the house, it is undisputed that he was there in the middle of the night. In addition, he referred to that house as his residence several times while talking to officers. Defendant also testified that he was in an upstairs bathroom when he heard banging on the front door. It is presumable that defendant was free to move about the house as he chose, and that he had the ability to put his belongings upstairs.

Aside from the evidence of defendant's presumable control and access in the house, defendant voluntarily told police that he kept a shotgun there. Defendant used the word "shotgun" in his statement, while police referred to the weapon recovered from the upstairs closet as a "rifle" or "long gun." Both parties agree that because defendant admitted to owning a weapon that was on the premises, but denied being the person seen outside in the street, the jury acquitted defendant of possessing the Glock handgun found outside, but convicted him of possessing the rifle found inside. The only evidence defendant produced to refute his statement was his own testimony that he did not say this. Defendant now argues on appeal that because of his military experience, he would not call a rifle a "shotgun," thus implying that he was referring to some weapon other than the rifle he claims belonged to his wife. If defendant's wife owned the rifle, it is reasonable to assume that he would know about it and would have told police about it when he was questioned. Instead, he provided nothing to this effect in his statement and actually admitted that he had a "shotgun" in the house.

The prosecutor does not bear the burden of negating every reasonable theory of innocence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). Therefore, the prosecutor need not rebut defendant's theories that he was referring to a "shotgun" in his statement and not a "rifle," or that someone else may have been the owner of the rifle that was found. The jury, as the fact finder, was free to determine the credibility of the testimony. This Court should not interfere with the jury's determination that defendant admitted to owning a shotgun. Based on that determination, the jury applied the judge's instructions regarding constructive possession.

The elements of felony-firearm are: (1) defendant possessed a firearm, (2) during the commission or attempted commission of a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003); MCL 750.227b. We have already concluded that it was reasonable for the jury to infer that defendant had access to, and control over, various areas of the home. In addition, defendant voluntarily gave a signed statement, admitting that he kept a shotgun in that home. Therefore, defendant had constructive possession of the rifle.

It was not irrational for the jury to find defendant knew of the location of the rifle, and the rifle was reasonably accessible by him. When viewing the evidence in the light most favorable to the prosecution, it is reasonable to infer that defendant knowingly possessed the rifle that was found in the closet, without being lawfully entitled to do so, and the elements of both crimes he was convicted of were met.

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood